Supreme Court, U.S.
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No. 99-1935

IN THE

Supreme Court of the United States

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

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Atlantic Mutual Insurance Company, *et al.* (hereinafter "Respondents" or "Underwriters"), respectfully submit this supplemental brief in answer to the Amici Curiae brief of the Attorneys General, submitted in support of the Petition for Certiorari.

ARGUMENT

I. THE ATTORNEYS GENERAL HAVE NO INTEREST IN THIS CASE AS ABANDONMENT IS NOT AN ISSUE AND THE ASA IS NOT INVOLVED

The brief of the Attorneys General advocates a different and novel definition of abandonment as this word is used in the Abandoned Shipwreck Act (43 U.S.C. § 2101 *et seq.*) ("ASA"). As noted at Page 11 of their brief, "The Shipwreck (S.S. CENTRAL AMERICA) is 160 miles from shore, well beyond the reach of the ASA." Since the S.S. CENTRAL AMERICA is not subject to the ASA, and the Attorneys General's brief relates to a new definition of abandonment of vessels under the ASA, the observations and comments of the Attorneys General are not applicable to the facts of this case.

This case involves a settlement by the parties whereby the salvage lien of the Petitioner was satisfied by a conveyance to it of title to a share (92.2 percent) of the salvaged treasure and the entry of a court order dismissing, with prejudice, all claims and issues in litigation. In reliance on the title received under the Settlement Agreement, and order, Petitioner sold its 92.2 percent share of the treasure.[1] Since the Petition seeks review of a decision rendered by the Fourth Circuit in 1992 which this Court declined to review, it is apparent that the Attorneys General were misinformed and they are unaware of the true status of this case.

Furthermore, abandonment will not be "a recurrent issue in this proceeding for many years to come" as suggested by Petitioner in page 4 of its reply brief, because all claims and

1. On June 20 and 21, 2000, the Respondents sold their 7.8 percent share of the treasure. As a result, no *res* exists at this time.

issues, including abandonment, have been settled and dismissed with prejudice by an order entered by the district court and reinstated by the Fourth Circuit. Contrary to the Petitioner's assertions, the Fourth Circuit was not asked to, it did not consider, it did not attempt to, nor was it required to, "fashion a remedy" in any way relating to the issue of abandonment. In the appeal to the Fourth Circuit the Petitioner requested that the court set aside and declare the settlement agreement null, void and of no effect and restore the parties to the status quo. It did not ask the court to fashion or provide any other remedy. Now that the Fourth Circuit has vacated the Order entered by the District Court on July 1, 1998, and confirmed the Settlement Agreement and reinstated the Dismissed Agreed Order of June 23, 1998, Petitioner is, for the first time, requesting this Court to reverse the Fourth Circuit's 1992 abandonment decision as a remedy for the District Court's *sua sponte* Amended Dismissed Agreed Order. If Petitioner prevails, the *sua sponte* action of the District Court will result in a reversal of the law of this case, a complete judicial repudiation of the Settlement Agreement, and a complete discharge of the Underwriters' claim to the salvaged gold. After twelve years of litigation, this is surely not the result the Attorneys General, or, this Court should endorse. Although the Fourth Circuit discussed the issue of abandonment, it was in the context of the effort of Petitioner to have the dissenting opinion in 974 F.2d 450 (4th Cir. 1992) adopted. The Fourth Circuit rejected this invitation to revisit and adopt the 1992 dissenting opinion and stated:

> We are of opinion that Columbus-America has been given all the protection it can be given consistent with due process and the previous opinion of this court in this case in 974 F.2d 450 (4th Cir. 1992) (Pet. App. 24a).

In affirming the validity of the Settlement Agreement and reinstating the dismissed with prejudice order, the Fourth Circuit did not, as petitioner contends, do so because it could not change its decision of 1992. The Court without any reference to the

issue of abandonment upheld the Settlement Agreement and reinstated the original Agreed Dismissal Order. Petitioner's contention that the Court of Appeals was prevented from accepting Petitioner's[2] proposed remedy for the amendment of the Settlement Agreement — a finding that the treasure was abandoned — is a complete misrepresentation of its own arguments and the rulings of the Fourth Circuit which held:

> Any argument that Columbus-America's counsel may have lacked authority to enter into the Settlement Agreement is without merit because the record clearly shows that Thompson, Columbus-America President, authorized its attorney to execute the contract of settlement at issue here . . . *Because the District Court's entry of the agreed dismissal order was correct, although for different reasons, we affirm entry of the order.* (Pet. App. 14a-15a) (Emphasis added).
>
> * * *
>
> Having found that the initial agreed dismissal order that effectuated the parties' Settlement Agreement was properly entered by the district court . . . we must now determine the disposition of this case. (Pet. App. 22a).

The Fourth Circuit then went on to reject Columbus-America's assertion that the Settlement Agreement could not

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2. Petitioner has contended that the denial of certiorari by the Supreme Court in 1993 was on the grounds that the lower court's decision was not a final judgment. This is a misrepresentation that is unsupported by any reference in the record or any decision. Interlocutory appeals in the Court of Appeals in an admiralty case is specifically allowed by 28 U.S.C. § 1292. The United States Supreme Court has jurisdiction to review any cases in the Court of Appeals. 28 U.S.C. § 1254. The effect of the United States Supreme Court refusing to grant certiorari is that the judgment or order is final and not subject to further review. *Patterson v. City of Newport News, Va.*, 364 F.2d 816 (4th Cir. 1966), *cert. denied*, 385 U.S. 650, *rehearing denied*, 386 U.S. 969 (1967).

be enforced and that the parties should be returned to the pre-settlement status.[3] (Pet. App. 22a-24a).

The court concluded:

> We thus, on remand, require the district court to re-enter its Dismissed Agreed order previously entered June 23, 1998. (Pet. App. 24a).

Not one word was said by the Court of Appeals to support Petitioner's statement in its reply brief at pages 4 and 5:

> On this issue, the crux of the decision below was that the absence of guidance on the standard for abandonment from a higher authority prevented the court of appeals from accepting Columbus-America's proposed remedy for the amendment — a finding of abandonment of the past recoveries — and permitted only as alternative remedy.

Furthermore, there is nothing in the record that lends credence to such a statement.

II. THERE IS NO SPLIT IN THE CIRCUITS ON THE ISSUE OF ABANDONMENT

Abandonment is a factual determination. *See People ex rel. Illinois Historic Preservation Agency v. Zych*, 186 Ill.2d 267, 710 N.E.2d 820 (Ill. 1999) where the court noted:

> In general, a finding of abandonment is considered a factual determination (*Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir. 1989); *Friedman v. United States*, 347 F.2d 697,704 (8th Cir. 1965)) . . .

186 Ill.2d at 278.

In *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *rehearing en banc*

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3. How that would be possible, given that Columbus-America had at this time sold the 92.2 percent share of the treasure title to which it received under the Settlement Agreement, was not stated by Columbus-America.

denied, cert. denied, 507 U.S. 1000 (1993), review of which is sought by the Petitioner, the Fourth Circuit held that the finding of abandonment by the district court was clearly erroneous and that there was no evidence to support such a determination stating:

> Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment.

974 F.2d at 464-465. (Pet. App. 60a, 66a).

This holding is consistent with the determinations made by every circuit court and state court that has considered and decided the issue of abandonment when a claim is asserted by an underwriter, or, under the rights of an underwriter or successor, as was made in this proceeding. *See Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000); *Deep Sea Research Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996), *aff'd. on jurisdiction and vacated on all other grounds, and remanded*, 523 U.S. 491 (1998); *People ex rel. Illinois Historic Preservation Agency v. Zych*, 186 Ill.2d 267, 710 N.E.2d 820 (Ill. 1999).

The cases cited by the Attorneys General at pages 5, 6, 7, 8, 9 and 10 of their brief to support the contention that there is a conflict between the circuits are not in point. The cases cited from the First, Third, Fifth and Eleventh Circuits all deal with suits in which no one appeared and asserted a claim of ownership in the salvage proceedings.[4] It is obvious that a vessel or its

4. In fact, very recent decisions in the Fifth and Eleventh Circuits, which involved claims by owners or those claiming rights of owners, cited favorably the Fourth Circuit's decision in this case (974 F.2d 450) as to the application of the law of salvage versus the law of finds. *See Adams v. Unione Mediterranea DiSicurta*, No. 98-30875, 2000 U.S. App. LEXIS 19808 (5th Cir. Aug. 14, 2000); *International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. July 17, 2000).

cargo is abandoned when, after publication by legal notice of the salvage, no one enters the proceedings and asserts a claim of ownership. To cite such cases to this Court and compare them to the determinations by circuit courts where owners have appeared, asserted and established ownership to create a "conflict" is disingenuous.

Judge Widener's comment in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291, 304, *rehearing denied* (4th Cir. 2000) set forth at footnote 24 of page 9 of the Attorneys General's brief to the effect that the United States Supreme Court, Sixth Circuit and the Ninth Circuit have rejected the Fourth Circuit's test of abandonment is inconsistent with the Sixth Circuit on remand from the Supreme Court in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999) where it held:

> We think that the apparent divergence of authority [between the Fourth and the Sixth and Ninth Circuits] *masks a degree of underlying agreement.* A close reading of the cases reveals a uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will. *To overcome this significant hurdle, the claimant may prove* abandonment by inference as well as by express deed. This proposition finds support even from those cases cited as examples of the doctrine of "express abandonment." See, e.g. Columbus-*America*, 974 F.2d at 464-65. ("Such abandonment must be proved by clear and convincing evidence, though, such an owner's express declaration abandoning title. Should the property encompass an ancient and longlost [sic] shipwreck, a court may infer an abandonment."); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960).

> ("While lapse of time and nonuser [sic] are not sufficient, in of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon."). Once these opinions recognize an exception to a rule of express abandonment, the question becomes after what length of years may a court infer abandonment, rather than draw arbitrary (time) lines separating express from implied tests, we choose to view length of time as one factor among several relevant to whether a court may infer abandonment.
>
> We agree that lapse of time, alone, does not necessarily establish abandonment, *see, e.g.*, *Wilkie*, 29 *F.Cas. at* 1247, and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a combination of several facts, proved clearly and convincingly, see part III.C. *infra*, may support a finding that an owner has abandoned a shipwreck.

177 F.3d at 499-500 (emphasis added).

> Proof by inference still requires proof, not conjecture — a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment.

Id. at 500.

This holding does not support the contention that a conflict exists between the Sixth and the Fourth Circuits on the issue of abandonment.

It is difficult to understand how Judge Widener can state that the Ninth Circuit has rejected the Fourth Circuit's test of abandonment when on the same page, he states:

> . . . the rule for finding abandonment is more stringent in this circuit [the Fourth] then in the Sixth

> Circuit and *may be the same* as the Ninth Circuit's rule in the *Brother Jonathan*.

203 F.3d at 304 (Pet. App. 28a) (emphasis added).[5]

Further, both of these cases relied on by Judge Widener, *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996), *aff'd. on jurisdiction and vacated on all other grounds*, 523 U.S. 491 (1998); and *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 105 F.3d 1078 (6th Cir. 1997), *aff'd on jurisdiction and reversed on all other grounds*, 523 U.S. 1091 (1998), were reversed and remanded by the Untied States Supreme Court on the issue of abandonment. The Supreme Court in the *Brother Jonathan* remanded these cases on that issue and specifically instructed the district court:

> There remains the issue whether the courts below properly concluded that the *Brother Jonathan* was not abandoned for purposes of the ASA. . . . Because the record before the Court is limited to the preliminary issues before the District Court, we decline to resolve whether the *Brother Jonathan* is abandoned within the meaning of the ASA. *We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under ASA conforms with its meaning under admiralty law.*

523 U.S. 508 (emphasis added).

It is misleading to cite these cases that were remanded on the issue of abandonment as support for the existence of a conflict in the circuits.

It is unfortunate that the Attorneys General repeat Judge

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5. Moreover, Judge Widener's 1992 dissent in this case (at 974 F.2d at 470) has little or no support in the Fourth Circuit as very recently a panel of the Fourth Circuit enthusiastically affirmed the 1992 majority opinion on abandonment. *See Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, Nos. 99-2035, 2036, 2000 U.S. App. LEXIS 17546 (4th Cir. July 21, 2000).

Widener's inaccurate and misleading recitation of the history of the *Brother Jonathan* and the *Captain Lawrence* cases by stating with respect to the abandonment issue that each case was "aff'd in part and vacated in part on other grounds." As the above quote from the Supreme Court in the *Brother Jonathan* clearly states, the cases were remanded for the district court to make a determination on abandonment with the clarification that the meaning of "abandoned" under the ASA conforms "with its meaning under admiralty law."

All of the courts that have considered the question of abandonment where an owner, or those claiming such ownership, have appeared, asserted and proved ownership, have resolved the issue of abandonment by applying the traditional law of admiralty, and, in so doing, have concluded that while abandonment can be inferred in appropriate situations it must be proved by clear and convincing evidence. No circuit court has held that the mere passage of time is enough, by itself, to establish an abandonment. Abandonment is a factual issue and there is no conflict in the findings of the Circuit Courts of Appeals on this issue.

III. THE ABSENCE OF SALVAGE TECHNOLOGY ARGUES AGAINST ABANDONMENT

The Attorneys General argue that the absence of technology at the time a loss occurs should support a finding of abandonment. The apparent rationale for this unique insight is that if the ability to salvage lost property was not in existence at the time the property was involuntarily taken from the owner's control, the owner must have given up all hope of retrieving it, and hence, the goods must have been abandoned. Such reasoning makes abandonment dependent upon the psychological state of the owner. Whereas, abandonment is a deliberate intentional act, established by either express denunciation of ownership, or, it is to be inferred from the totality of the facts. The property owner's depression or optimism over his opportunity or chances to recover his property is not the determinant.

One shudders to think of the effect such a holding will have on the ownership of stolen property. Only a small portion of stolen property is ever recovered. Certainly a resident of New York City has little or no hope that property stolen from him will be returned. Yet some stolen property is found.[6] Is all such property now to be considered abandoned? Abandonment occurs when a person makes a conscious decision that he will no longer assert ownership over the lost property. This occurs when he expressly so states or demonstrates that even though the property is available, he does nothing to reduce it to his possession after the passage of a considerable period of time. Abandonment does not occur because the technology does, or does not, exist to recover the lost property at the exact time it is involuntarily taken from his possession.

It makes as much sense to say that if at the time of loss the technology to salvage a shipwreck exists is evidence that an abandonment did not occur, as to state that the lack of the same technology is evidence that an abandonment did occur.

CONCLUSION

It is apparent that the Attorneys General were uninformed or they were misled as to the facts and proceedings in this litigation and that the Fourth Circuit was not asked to "fashion a remedy" relating to abandonment. Furthermore, the Attorneys General did not realize that this case was settled and that Petitioner received title to a portion of the treasure under the Settlement Agreement which it affirmed by selling its share of the treasure.

The efforts to create a "conflict" between Circuit Courts of Appeal by citing to cases that were reversed by this Court and cases where no owner appeared and claimed ownership comes with little grace. Since the citing of such cases to create a "conflict" with circuits that have decided cases where an owner has appeared and established ownership is misleading, no effect should be given to the Attorneys General brief and the Petition for a Writ or Certiorari should be denied.

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6. A considerable amount but only a tiny fraction of the amount stolen.

Respectfully submitted,

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